SERAC ASIA SDN BHD A

v.

SEPAKAT INSURANCE BROKERS SDN BHD

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
SYED AHMAD HELMY JCA
BALIA YUSOF WAHI JCA
[CIVIL APPEAL NO: W-02(IM)-2690-2011]
5 OCTOBER 2012 C

CIVIL PROCEDURE: *Res judicata - Principle of - Exceptions to principle of res judicata - Special circumstances - Discovery of fresh evidence - Discovery of falsity in plaintiff's pleading - Failure to disclose relevant and material facts - Locus standi - Whether amount to special circumstances to re-open litigation* D

CIVIL PROCEDURE: *Striking out - Application for - Judgment-in-default of appearance - Application to set aside judgment dismissed - Whether defendant can now apply to strike out writ of summons and statement of claim by relying on fresh evidence - Locus standi - Judgment -in-default obtained based on misrepresentation of fact and by fraud - Whether application allowed* E

INSURANCE: *Accident insurance - Insurable interest - Insurance coverage for aircraft obtained - Claim made pursuant to damage to aircraft - Claim repudiated by insurers - Aircraft registered under name of a third party and not plaintiff - Whether plaintiff had insurable interest* F

INSURANCE: *Duty of disclosure - Contract uberrima fides - Misrepresentation of material fact by assured - Whether insurer can repudiate policy* G

The plaintiff/appellant appointed the defendant/respondent as the insurance brokers to secure insurance coverage for the plaintiff's aircraft. Subsequently a mishap happened, causing substantial damage to the aircraft. The plaintiff was later informed by the defendant that the claim was repudiated by the insurers. The plaintiff thus commenced the present suit against the defendant. The plaintiff entered judgment in default of appearance against the defendant. The defendant's application to set aside the said judgment was dismissed by the Registrar. The defendant's appeals to the Judge in Chambers and to the Court of Appeal were H I

dismissed. The defendant's application for leave to appeal to the Federal Court was also dismissed. Hence, the merits of the plaintiff's claim and the merits of the defendant's defence had been considered by the High Court, Court of Appeal and by the Federal Court. The defendant subsequently applied under O. 18 r. 19(1)(a) and/or (d) of the Rules of the High Court 1980 to strike out the plaintiff's writ of summons and statement of claim on the ground that it disclosed no reasonable cause of action or was an abuse of the process of the court. The defendant relied on evidence which showed that the aircraft was registered in the name of Sprint Air Inc and not the plaintiff. Consequently, the defendant claimed that the plaintiff had no insurable interest in the subject matter of the claim. The plaintiff submitted that the defendant had been duly heard and had exhausted all the available legal avenues to raise whatsoever merits or submissions or objections against the plaintiff's claim before the High Court, Court of Appeal and Federal Court and, consequently, the defendant ought not to be allowed to raise the same objections against the same claim in the defendant's application. The plaintiff also contended that if the defendant, having knowledge of the legal argument pertaining to "insurable interest", failed to raise it in the four forums open to it earlier, the defendant must now be estopped from raising it and hiding under the veil of the purported "fresh evidence". The High Court allowed the defendant's application and struck out the plaintiff's writ of summons and statement of claim. Hence, the plaintiff brought this appeal against that decision.

Held (dismissing appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The plea of *res judicata* did not apply in this case because of the existence of special circumstances. It is an exception to the general rule. The court will not permit the parties to open the same subject of litigation except in special cases. In the context of the present appeal it was the existence of fresh evidence; *Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* (refd). (paras 14 & 15)

(2) The defendant had amply provided sufficient evidence to show to the court that there were special circumstances that ought to be considered, namely: (a) the plaintiff's false pleading; (b) the unconscionable conduct of the plaintiff by its failure to

disclose relevant and material facts; and (c) the challenge to *locus standi* which would result in the dismissal of the plaintiff's suit *in limine*. The issue of *locus standi* was never raised by reason of the fraud perpetrated by the plaintiff in not disclosing a very material fact - that the plaintiff was not the owner of the Cessna aircraft in question; *Everise Hectares Sdn Bhd v. Citibank Bhd* (refd). (paras 16-18)

(3) The documents evidencing ownership of the Cessna aircraft should be admitted as fresh evidence to show that the plaintiff was not the registered owner of the aircraft and, consequently, the plaintiff's claim against the defendant should be struck out. (para 28)

(4) Since the plaintiff was not the registered owner of the aircraft, it had no *locus standi* to commence this suit against the defendant. Likewise, the judgment-in-default should have been set aside and the whole action should be struck out for want of *locus standi* on the part of the plaintiff to initiate this proceeding. The present plaintiff is the wrong litigant. The right litigant is Sprint Air Inc. (paras 30-31)

(5) The judgment-in-default was obtained by the plaintiff based on a misrepresentation of fact and by fraud and that would entitle the defendant to set aside the judgment in default. By not revealing and disclosing the material fact that the aircraft was not registered in the plaintiff's name, and by not disclosing the relevant documents to show the legal ownership of the Cessna aircraft, the plaintiff had committed fraud towards this court. The non-disclosure of the material documents during the hearing amounted to an unconscionable conduct on the part of the plaintiff and such unconscionable conduct amounted to nothing less than fraud. (paras 36-37)

(6) An insurance contract is a contract *uberrima fides*. An insurer can avoid the insurance policy if he can prove that there has been misrepresentation of a material fact by the assured; *Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd* (refd). (para 53)

(7) The plaintiff had no insurable interest in the aircraft at the very inception of the insurance policy because the plaintiff was not the registered legal owner of the aircraft. (para 57)

A ***Bahasa Malaysia*** *Translation of Headnotes*

Plaintif/perayu telah melantik defendan/responden sebagai broker insurans untuk mendapatkan perlindungan insurans bagi pesawat plaintif. Kemudian, kejadian yang tidak diingini telah berlaku hingga menyebabkan kerosakan besar kepada pesawat. Plaintif seterusnya dimaklumkan oleh defendan bahawa tuntutan tersebut ditolak oleh penanggung insurans. Plaintif memulakan tindakan ini terhadap defendan. Plaintif memasukkan penghakiman ingkar bagi kehadiran, terhadap defendan. Permohonan defendan untuk mengetepikan penghakiman tersebut ditolak oleh Pendaftar. Rayuan defendan kepada Hakim dalam Kamar dan Mahkamah Rayuan telah ditolak. Permohonan defendan bagi keizinan untuk merayu kepada Mahkamah Persekutuan juga ditolak. Oleh itu, merit-merit tuntutan plaintif dan merit-merit pembelaan defendan telah dipertimbangkan oleh Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan. Defendan kemudiannya memohon di bawah A. 18 k. 19(1)(a) dan/atau (d) Kaedah-kaedah Mahkamah Tinggi 1980 untuk membatalkan writ saman dan penyataan tuntutan plaintif atas alasan bahawa ia tidak mendedahkan sebarang kausa tindakan munasabah atau merupakan penyalahgunaan proses mahkamah. Defendan bersandarkan kepada bukti yang menunjukkan bahawa pesawat tersebut telah didaftarkan di bawah nama Sprint Air Inc dan bukannya plaintif. Dengan itu, defendan mendakwa bahawa plaintif tidak mempunyai kepentingan boleh insurans dalam perkara tuntutan tersebut. Plaintif mengemukakan bahawa defendan telah didengar dengan sewajarnya dan menggunakan kesemua saluran undang-undang untuk membangkitkan apa jua merit, hujahan atau bantahan terhadap tuntutan plaintif di hadapan Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan dan, akibatnya, defendan tidak seharusnya dibenarkan untuk membangkitkan bantahan yang sama terhadap tuntutan yang sama dalam permohonan defendan. Plaintif juga menghujahkan bahawa jika defendan, dengan pengetahuan hujahan undang-undang berkaitan 'kepentingan boleh insurans', gagal untuk membangkitkannya dalam keempat-empat forum terbuka tersebut, defendan mestilah diestop daripada membangkitkan dan berselindung di balik dakwaan 'bukti baru'. Mahkamah Tinggi membenarkan permohonan defendan dan membatalkan writ saman dan penyataan tuntutan plaintif. Oleh itu, plaintif merayu terhadap keputusan tersebut.

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Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Rayuan *res judicata* tidak terpakai dalam kes ini kerana terdapatnya hal keadaan khas. Ia adalah pengecualian kepada peraturan am. Mahkamah tidak akan membenarkan pihak-pihak untuk membuka subjek litigasi yang sama kecuali dalam kes-kes khas dan dalam konteks rayuan ini, ia adalah kewujudan bukti baru (*Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor; dirujuk*).

(2) Defendan telah mengemukakan banyak bukti yang mencukupi untuk menunjukkan kepada mahkamah bahawa terdapat keadaan khas yang sepatutnya dipertimbangkan, iaitu: (a) pliding palsu plaintif; (b) perilaku berat sebelah plaintif dengan kegagalannya untuk mendedahkan fakta relevan dan penting; dan (c) cabaran kepada *locus standi* yang akan mengakibatkan penolakan guaman plaintif *in limine*. Isu *locus standi* tidak pernah dibangkitkan oleh sebab penipuan yang dilakukan oleh plaintif kerana tidak mendedahkan fakta yang amat material - bahawa plaintif bukan pemilik pesawat Cessna yang menjadi pertikaian (*Everise Hektar Sdn Bhd v. Citibank Bhd*; dirujuk).

(3) Dokumen-dokumen yang membuktikan pemilikan pesawat Cessna harus diterima sebagai keterangan baru untuk menunjukkan bahawa plaintif bukan pemilik berdaftar pesawat dan, akibatnya, tuntutan plaintif terhadap defendan harus dibatalkan.

(4) Oleh kerana plaintif bukan pemilik berdaftar pesawat, ia tidak mempunyai *locus standi* untuk memulakan tindakan ini terhadap defendan. Begitu juga dengan penghakiman ingkar yang harus diketepikan dan seluruh tindakan harus dibatalkan kerana ketiadaan *locus standi* di pihak plaintif untuk memulakan prosiding ini. Plaintif dalam tindakan ini adalah litigan yang salah. Litigan yang sepatutnya adalah Sprint Udara Inc.

(5) Penghakiman ingkar telah diperolehi oleh plaintif berdasarkan salah nyataan fakta dan fraud dan ini melayakkan defendan untuk mengetepikan penghakiman ingkar. Dengan tidak mendedahkan fakta material bahawa pesawat tersebut tidak didaftarkan atas nama plaintif, dan dengan tidak mendedahkan dokumen-dokumen yang berkaitan untuk menunjukkan pemilikan sah pesawat Cessna, plaintif telah melakukan

penipuan terhadap mahkamah ini. Ketidakdedahan dokumen-dokumen penting semasa pendengaran terjumlah kepada perilaku berat sebelah di pihak plaintif dan perilaku sedemikian adalah tidak kurang daripada penipuan.

(6) Sesuatu kontrak insurans adalah kontrak *uberrima fides*. Penanggung insurans boleh mengelakkan polisi insurans jika dia boleh membuktikan bahawa telah berlaku salah nyataan fakta material oleh pihak yang diinsuranskan; (*Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd*; dirujuk).

(7) Plaintif tidak mempunyai kepentingan boleh insurans ke atas pesawat di awal permulaan polisi insurans kerana plaintif bukan pemilik berdaftar pesawat yang sah.

Case(s) referred to:

Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors [1997] 2 MLJ 11 CA ***(refd)***

Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd [1992] 1 CLJ 330; [1992] 4 CLJ (Rep) 324 HC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chung Kuo Ping v. Malaysian Assurance Alliance Bhd [2008] 3 CLJ 752 CA ***(refd)***

Everise Hectares Sdn Bhd v Citibank Bhd [2011] 2 CLJ 25 CA ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Hoystead And Others v. Commissioner of Taxation [1926] AC 155 ***(refd)***

Hue Ngee On v. Chai Woo Sien (sebagai Pegawai Awam Persatuan Hakka Kulai, Johor) [2009] 5 CLJ 734 CA ***(refd)***

Ladd v. Marshall [1954] 1 WLR 1489 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor [1997] 3 CLJ 305 FC ***(refd)***

Ling Kuok Teck & Anor v. Tseng Choon Chin & Ors [1995] 3 CLJ 889 HC ***(refd)***

Parasuraman Kuppan v. Sazali Md Akhir & Anor [1997] 4 CLJ 62 HC ***(refd)***

Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***

Raja Zainal Abidin Raja Haji Takchik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***

Tan Keat Seng Kitson v. Kerajaan Malaysia [1996] 2 CLJ 722 HC ***(refd)***

Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

UMBC Finance Bhd v. Dato' Seri Dr M Mahadevan Mahalingam [2008] 6 CLJ 191 CA ***(refd)***
Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(refd)***
Wong Cheong Kong Sdn Bhd v. Prudential Assurance Sdn Bhd [1998] 1 CLJ 916 HC ***(refd)***
Yeo Siew Kiow lwn. Nyo Chu Alang & Yang Lain [1996] 1 LNS 104 HC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1)(a), (d), O. 42 r. 13, O. 56 r. 1(3A)

For the appellant - K Jeyaraj; M/s K Jeyaraj Fadhli Sin
For the respondent - M Menon (Nor Adila Ahmad Taib with him); M/s Jaffar & Menon

[Appeal from High Court, Kuala Lumpur; Suit No: D4-22-1552-2005]

Reported by Amutha Suppayah

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The parties will be referred as to what they were referred to at the High Court. Thus, Serac Asia Sdn Bhd (No. Syarikat: 43697-V) will be referred to as the plaintiff while Sepakat Insurance Brokers Sdn Bhd (No. Syarikat: 212441-V) will be referred to as the defendant.

[2] This judgment concerned an appeal by the plaintiff against the decision of the High Court at Kuala Lumpur in striking out the plaintiff's writ of summons and the statement of claim.

The Background Facts

[3] Chronologically, the background facts showed the sequence of events of what had transpired in the courts. They will be set out as follows:

(a) on 3 January 2006, the plaintiff had entered judgment in default of appearance against the defendant;

A (b) on 22 June 2006, the defendant had filed an application to set aside the said judgment and the Registrar had dismissed the defendant's application;

(c) on 10 October 2006, the defendant had appealed to the judge
B in chambers and that appeal was dismissed;

(d) on 6 April 2010, the defendant's appeal to the Court of Appeal was dismissed but the said judgment was amended after hearing the appeal and that judgment is a final judgment for damages;
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(e) on 18 August 2010, the defendant's application for leave to appeal to the Federal Court was dismissed; and

(f) it must be borne in mind that the said judgment was amended
D to the extent that paras (a) and (b) of the said judgment were struck out and para. (c) was maintained where the special and general damages are to be assessed before the Registrar of the High Court.

E **The Plaintiff's Statement of Claim**

[4] It is appropriate, to state in a nutshell, the plaintiff's statement of claim:

(a) The plaintiff states that based on the oral representations of
F the defendant's Assistant General Manager, the defendant was appointed as the insurance brokers to secure insurance coverage for the plaintiff's aircraft.

(b) At para. 6 of the statement of claim, the plaintiff pleads that
G it intended to purchase an aircraft - Cessna 421 BN 700BC in Chicago, United States of America, and then to fly the aircraft to Malaysia *via* Le Mans Airport, France. It is pleaded that the defendant was appointed to source for the best available insurance coverage for the Cessna aircraft. The
H plaintiff further pleads that the certificate of insurance was issued by the defendant since 27 July 2004 for the ferry flight from Chicago to France and then to Malaysia. But it must be stated that the defendant is a broker and not an insurer.

(c) Some nine months after landing in France - to be precise on
I 28 April 2005, a mishap happened. While the plaintiff was carrying out an inspection on the Cessna aircraft, the brakes of the Cessna aircraft malfunctioned. The Cessna aircraft could

not be controlled, it went forward and crashed into the hangar door and into another stationary aircraft causing substantial damage to the Cessna aircraft.

(d) It is the plaintiff's pleaded case that the plaintiff then requested the defendant to lodge a claim on the plaintiff's behalf and despite various requests neither the defendant as the broker nor as the insurer took any actions until the plaintiff was informed by the defendant that the claim was repudiated by the insurers. But the insurers were not made a party to this action.

Can a Suit where a Judgment, in Respect of Liability, has been Held Valid by the Court of Appeal and the Federal Court be Subsequently Struck Out Summarily by the High Court?

[5] As demonstrated earlier, the merits of the plaintiff's claim and the merits of the defendant's defence had been considered earlier by the High Court on 22 June 2006 and 10 October 2006, and by the Court of Appeal on 6 April 2010 and by the Federal Court on 18 August 2010 in the hearing of the defendant's application to set aside the default judgment which was entered against the defendant on 3 January 2006.

[6] That being the case, it was argued that the finding that the defendant has no defence on the merits is *res judicata*.

[7] It was submitted that the defendant had been duly heard and had exhausted all the available legal avenues to raise whatsoever merits or submissions or objections against the plaintiff's claim before the High Court, before the Court of Appeal and before the Federal Court and, consequently, the defendant ought not to be allowed to raise the same objections against the same claim in the defendant's application in encl. 29.

[8] It was submitted that if the defendant, having knowledge of the legal argument pertaining to "insurable interest", failed to raise it in the four forums open to it earlier, the defendant must now be estopped from raising it and hiding under the veil of the purported "fresh evidence".

[9] But the evidence about the ownership of the aircraft - the Cessna 421 BN 700BC, came from the plaintiff. It was the plaintiff who claimed to be the owners of the Cessna aircraft. But the evidence shows that the Cessna aircraft is registered in the

A name of Sprint Air Inc and not the plaintiff. Consequently, the plaintiff has no insurable interest in the subject matter of the claim. And the answer to the question posed would be in the affirmative.

[10] Justice Hamid Sultan bin Abu Backer in his written grounds
B of judgment at p. 17 of the appeal record at Jilid 1 aptly said about the issue of fresh evidence in this way:

> It must be noted that there is no matter pending before me to consider the issue of fresh evidence.

C **[11]** His Lordship further said at pp. 19 to 22 of the appeal record at Jilid 1 the following, which we gratefully adopt:

> Brief Facts
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> (5) The plaintiff's claim is in respect of aircraft which the
> D defendant says the plaintiff is not the owner of and in consequence they cannot claim under the insurance policy as they will not have insurable interest. The defendant further says that they were not aware of this fact and they came to know when the plaintiff's solicitors served a bundle of
> E documents for the purpose of assessment on 20.5.2011. The defendant concedes that they were not able to raise this issue before the High Court or Court of Appeal in their application to set aside the default judgment. The plaintiff does not address the issue of ownership and says:
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> F > It is obvious the defendant knew of the registration of the aircraft in the name of Sprint Air Inc. and is now attempting to use this as (an) argument to defeat the plaintiff's claim. Despite this argument having no chances of success in the circumstances, the defendant
> G > must not be allowed to bring new arguments at this late stage through the back door through this application.
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> (6) I have read the application, affidavits, exhibits and submissions of the parties in detail. I take the view that the defendant's prayer to strike out the writ must be allowed.
> H My reasons *inter alia* are as follows:
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> (a) From the evidence before me it cannot be disputed that the registration of the aircraft is in the name of Sprint Air Inc. and not the plaintiff. In consequence the plaintiff does not have insurable interest in the subject matter of
> I the claim.

(b) It is trite that insurable interest is a condition precedent for any claim in respect of insurance policy. Support for the proposition is found in a number of cases. In *Chung Kuo Ping (supra)* the court held:

> 'Insurable interest' must necessarily involve pecuniary interest in the subject matter of the insurance. The assured must necessarily be interested in the value of the thing concerning which he could recover insurance compensation.
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> The basis upon which the insured rests his right to claim must necessarily be based upon something such as ownership, trust or perhaps, bailment. In other words, at the inception of the policy, and at the time the event that gave rise to the claim occurs, such matters must or should have been contemplated, and if later required, must necessarily be shown to exist by the insured ie, in relation to the goods he insures'.

(c) I am mindful of the fact that the defendant was not able to set aside the default judgment in various stages but not on the issue of insurable interest. Even assuming the plaintiff has completed the assessment the defendant will not be prohibited in law to seek a declaration that the judgment is a nullity in consequence of the plaintiff, not having insurable interest in the subject matter of the policy.

(d) There is much merit in the defendant's submission that the act of the plaintiff by not revealing and disclosing the material fact that the aircraft Cessna was not registered under the plaintiff's name and not disclosing the documents in support of the fact so asserted shows that the plaintiff had committed fraud obtaining the default judgment. Support for the proposition is found in a number of cases. To name a few are as follows:

(i) In *Ling Kuok Tech & Anor (supra)* the court held:

> A judgment obtained by fraud may be treated as a nullity. Non-disclosure of material documents at the trial amounts to an unconscionable conduct and an unconscionable conduct amounts to fraud. The withholding of the two documents at the trial in the former suit was crucial. By concealing them the defendants had committed an unconscionable conduct, which amounts to fraud.

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> An action will lie to rescind a judgment on the ground of discovery of new evidence which would have a material effect on the decision of the Court ... .

(ii) In *Hock Hua Bank Bhd (supra)* the court held:

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> If a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

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> In this case the learned judge had no jurisdiction to set aside his own order and the original order must be restored, leaving it to the respondent to take out a fresh action to set aside the order on the ground of fraud.

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(7) In my view this is a fit and proper case to strike out the plaintiff's action with no order as to costs.

[12] Learned counsel for the plaintiff submitted that in the two cases relied upon by the learned High Court judge, namely:

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(a) *Ling Kuok Teck & Anor v. Tseng Choon Chin* & Ors [1995] 3 CLJ 889; and

(b) *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92, FC,

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the plaintiffs/applicants there filed fresh suits based on fraud to impeach the original judgments. Likewise here, it was submitted that in the event the defendant alleges fraud on the part of the plaintiff then the defendant is at liberty to file a fresh suit to impeach the earlier judgment and the defendant would then be required to prove the alleged fraud according to the established

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law and procedure. For fraud, the burden of proof would be beyond reasonable doubt.

[13] Put in another way, the plaintiff is contending that the issues raised by the defendant in the summons in chambers application

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in encl. 29 are "*res judicata*" in the sense that earlier on the defendant had filed an application to set aside the judgment in default on 28 April 2006 as reflected in encl. 6.

[14] It must be emphasised that the defendant's application in

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encl. 29 concerned the challenge mounted by the defendant pertaining to the non-disclosure of material fact by the plaintiff and the issue of the existence of fresh evidence.

[15] It is our judgment that the plea of *res judicata* does not apply in this case because of the existence of special circumstances. It is an exception to the general rule. The court will not permit the parties to open the same subject of litigation except in special cases (*Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor* [2000] 1 CLJ 553, CA, at p. 564, line b) and in the context of the present appeal it is the existence of fresh evidence.

[16] In our judgment, the door is not shut to the court to re-litigate the matter since there are special circumstances shown. The defendant had amply provided sufficient evidence to show to the court that there are special circumstances that ought to be considered, namely:

(a) the plaintiff's false pleading;

(b) the unconscionable conduct of the plaintiff by its failure to disclose relevant and material facts; and

(c) the challenge to *locus standi* which will result in the dismissal of the plaintiff's suit *in limine*.

[17] On *locus standi* and *res judicata*, reference should be made to the decision of this court in *Everise Hectares Sdn Bhd v Citibank Bhd* [2011] 2 CLJ 25. Here, the issue of *locus standi* was never raised by reason of the fraud perpetrated by the plaintiff in not disclosing a very material fact - that the plaintiff is not the owner of the Cessna aircraft in question.

[18] Sharma J in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74, at p. 76 had this to say about *res judicata* (which was adopted by this court in *Everise Hectares Sdn Bhd v. Citibank Bhd (supra)*):

> It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively *res judicata*.

[19] There is an old vintage case that should be referred to. It is *Henderson v. Henderson* [1843] 3 Hare 100, 114 where Wigram VC had this to say:

> In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that

A litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[20] And this very passage was applied and approved by the Privy Council in *Hoystead And Others v. Commissioner of Taxation* [1926] AC 155.

[21] On the authority of *Henderson v. Henderson (supra)*, it may be stated that except in special cases, the plea of *res judicata* would apply. Here, as demonstrated, there are special circumstances and the plea of *res judicata* does not apply.

[22] The plaintiff made reference to the Federal Court case of *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141 and relied on the following passage at p. 145 to highlight the point "that a litigant should not be permitted to succeed in an appeal upon a point not raised or pleaded before the court of first instance". But here, the fact of the matter was that the defendant had no opportunity to file its defence since the judgment in default was entered without hearing any merits whatsoever.

Adducing Fresh Evidence

[23] It is appropriate to refer to O. 56 r. 3A of the Rules of the High Court 1980 ("RHC") which reads as follows:

(3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:

(a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

[24] Order 56 r. 3A of the RHC is a statutory codification of the principles laid down in *Ladd v. Marshall* [1954] 1 WLR 1489, CA to the effect that fresh evidence is not admissible on the hearing of an appeal unless the conditions set out therein are satisfied. The test is to determine whether evidence which was not raised at the trial should be admitted on appeal. The test may be worded in this way: firstly, that it must be shown that the evidence would not have been obtainable at the trial even though reasonable diligence is exercised by the applicant; secondly, that it must be shown that the fresh evidence would, in all probability, have an impact on the court's decision.

[25] Factually speaking, it was on 20 May 2011 that the plaintiff's solicitors served a bundle of documents for the purpose of assessment of damages. On perusal of the documents, the defendant discovered a new material fact that the aircraft - the Cessna 421 BN 700BC, is owned by a company known as Sprint Air Inc. Whereas the plaintiff is Serac Asia Sdn Bhd (No: Syarikat 43697-V) and it is now claiming for damages for the damage caused to the Cessna aircraft due to an accident that occurred on 28 April 2005. It was for this reason that the defendant filed an application in encl. 29 and sought to adduce fresh evidence and to strike out the plaintiff's claim.

[26] And during the hearing of the application to set aside the judgment in default on 3 January 2006 before the Registrar, before the High Court judge and before the Court of Appeal, the above material fact in regard to the registered ownership of the Cessna aircraft was not available nor was it made known to the defendant (see the affidavit in support affirmed by Azizulhisham bin Che Hasihim on 29 June 2011 as seen at pp. 1 to 7 of the appeal record at Jilid 2(1)). Be it noted that the documents showing that the registered ownership of the aircraft Cessna 421BN 700 BC can be seen at Annexure "A" to pp. 84 to 85 of the appeal record at Jilid 1 which show that the registered owner of the aircraft is Sprint Air Inc and not the plaintiff.

[27] The headnote to *Ladd v. Marshall (supra)* at p. 1489 reads as follows:

> Leave to adduce further evidence on appeal will only be granted (1) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) if the further evidence is such that, if given, it would probably have an

A important influence on the result of the case, though it need not be decisive, and (3) if the evidence is such as is presumably to be believed.

[28] Abdul Malik bin Ishak, JCA in *Hue Ngee On v. Chai Woo Sien (sebagai Pegawai Awam Persatuan Hakka Kulai, Johor)* [2009] 5 CLJ 734, CA analysed the meaning and purport of *Ladd v. Marshall (supra)* at some length and admitted the affidavit (including the exhibit) as further evidence in order to establish that the Association is the registered proprietor of the land and as a result of which the appellant's appeal there was struck out. Likewise here, the documents evidencing ownership of the Cessna aircraft should be admitted as fresh evidence to show that the plaintiff is not the registered owner of the Cessna aircraft in question and, consequently, the plaintiff's claim against the defendant should be struck out.

Striking Out the Plaintiff's Claim under O. 18 r. 19 of the RHC 1980

[29] The defendant applied under O. 18 r. 19(1)(a) and/or (d) of the RHC to strike out the plaintiff's writ of summons and the statement of claim on the ground that it discloses no reasonable cause of action or it is an abuse of the process of the court.

[30] Since the plaintiff is not the registered owner of the Cessna aircraft, it has no *locus standi* to commence this suit against the defendant. Likewise the judgment in default should have been set aside and the whole action should be struck out for want of *locus standi* on the part of the plaintiff to initiate this proceeding.

[31] The obvious effect of *locus standi* is to exclude the plaintiff from having access to the courts. The *locus standi* rule is a technique of exclusion to exclude the plaintiff from gaining access to the courts. The question of standing goes to the jurisdiction of the court. In *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, SC, Salleh Abas LP had this to say about *locus standi* at p. 68 of the report:

> Every legal system has a built-in mechanism to protect its judicial process from abuse by busy-bodies, cranks and other mischief-makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes. This special interest is a nexus between him and the party against whom he brings his complaints to court and is known as *locus standi*.

[32] Abdul Hamid Omar CJ (Malaya) in the same case at p. 77 aptly said: A

> This appeal raises an issue of considerable importance. The central issue revolves round the question of '*locus standi*' of a private person seeking a declaration and an injunction in a case for the enforcement of a public right purportedly for public interest. B
>
> '*Locus standi*' is generally understood to mean the right of a party to appear and be heard by a tribunal. A litigant is said to have *locus standi*, in effect standing to sue in a court of law, if that court recognises his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of the substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant. C D
>
> Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not of a private right, standing will be denied unless the Attorney-General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally. E F

[33] In short, the present plaintiff is the wrong litigant. The right litigant is Sprint Air Inc. The present plaintiff lacked standing to institute this claim against the defendant.

[34] The failure on the part of the plaintiff in disclosing the material fact pertaining to the ownership of the Cessna aircraft and using this court as a springboard to pursue its non *bona fide* claim amounted to an abuse of the process of the court. The court has the inherent jurisdiction to prevent an abuse of its process (*Raja Zainal Abidin Raja Haji Takchik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606). The court too must swiftly act to stop in its track any abuse of the process of the court and must ensure that the use of the court process must be *bona fide*. And the court too will strike out a claim in plain and obvious cases and where the claim is obviously unsustainable (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, SC; *Arah Cipta Sdn Bhd & Anor v. Kian Kee Sawmills (M) Sdn Bhd & Ors* [1997] 2 MLJ G H I

A 11, CA; *Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305, FC; *Yeo Siew Kiow lwn. Nyo Chu Alang & Yang Lain* [1996] 1 LNS 104; *Pengiran Othman Shah Pengiran Mohd Yusoff & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257, CA; and *Tan Keat Seng Kitson v. Kerajaan Malaysia* [1996] 2 CLJ 722).

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[35] Here, the defendant is a broker and an agent of the plaintiff and the defendant is not the correct and proper party to be sued. To compound the matter further, the plaintiff not being the registered legal owner of the Cessna aircraft has no cause of C action against the defendant and, consequently, has no *locus standi* to pursue its claim against the defendant (*UMBC Finance Bhd v. Dato' Seri Dr M Mahadevan Mahalingam* [2008] 6 CLJ 191, CA).

Order 42 Rule 13 of the RHC 1980 - To Set Aside the Default Judgment

D

[36] Pursuant to O. 42 r. 13 of the RHC 1980, the defendant filed an application to set aside the default judgment as well as under the inherent jurisdiction of the court. It is trite that until it is set aside or varied by way of a proper application, a perfected E order approved by the Registrar, even though it contains the wrong interpretation of a decision, must be implicitly obeyed and cannot be treated as a nullity (*Parasuraman Kuppan v. Sazali Md Akhir & Anor* [1997] 4 CLJ 62, HC). Here, it is plain and obvious that the judgment in default was obtained by the plaintiff based F on a misrepresentation of fact and by fraud and that would entitle the defendant to set aside the judgment in default.

[37] By not revealing and disclosing the material fact that the Cessna aircraft was not registered in the plaintiff's name, and by G not disclosing the relevant documents to show the legal ownership of the Cessna aircraft, the plaintiff had committed fraud towards this court.

[38] It is germane to mention that the crucial issue of the day H revolved on the question of whether a judgment obtained by fraud may be treated as a nullity and may be impeached, set aside or rescinded? And flowing from it would be an equally crucial issue to decide and that would be whether the judgment in default would be rescinded on the ground of discovery of new evidence? I The answers to these two questions are in the positive.

[39] Interestingly, according to the case of *Wong Cheong Kong Sdn Bhd v. Prudential Assurance Sdn Bhd* [1998] 1 CLJ 916, "A statement made by an insured is fraudulent, if he knows it to be false and makes it, in order that the insurers may act on it" (per Vincent Ng J (later JCA)).

[40] The sum total of it all would be this. That the non-disclosure of the material documents during the hearing amounted to an unconscionable conduct on the part of the plaintiff and such unconscionable conduct amounted to nothing less than fraud. It is patently clear that the withholding of the crucial documents and the concealment of the same showed that the plaintiff had committed an unconscionable conduct tantamounting to fraud.

Was there Discovery of "Fresh Evidence"?

[41] Based on the evidence, the answer would be in the positive. The e-mail at p. 86 of the appeal record at Jilid 2(1) is from the plaintiff and it was dated 31 October 2004. It did not say that the Cessna aircraft is registered in the name of Sprint Air Inc. It stated that JJ Graffin has registered a US company under the name and style of Sprint Air Inc.

[42] The investigation report as reflected at p. 79 of the appeal record at Jilid 2(1) was not dated 28 April 2005. The date 28 April 2005 was the actual date of the accident of the aircraft.

[43] Earlier on, by letter dated 16 August 2004 as seen at p. 84 of the appeal record at Jilid 2(1), the plaintiff paid the premium to the defendant. Sprint Air Inc did not pay the premium on 16 August 2004 to the defendant.

[44] And the plaintiff through its solicitors Messrs K Jeyaraj & Co in a letter dated 8 September 2005 addressed to the defendant as seen at p. 87 of the appeal record at Jilid 2(1), demanded an amount in excess of Euro 126,000 from the defendant. It must be borne in mind that the date of the actual accident of the aircraft was 28 April 2005.

[45] Messrs Bertil Grimme (Asia) Limited, the re-insurance brokers, by letter dated 14 September 2005 addressed to the defendant as seen at p. 89 of the appeal record at Jilid 2(1) stated that, "the underwriters have denied the claim because there was no cover on this aircraft at the time of (and the location of) this incident". It must be borne in mind that the denial of the

A claim was not on the basis that the Cessna aircraft was owned by another entity. And by way of a reply from the plaintiff through its solicitors Messrs K Jeyaraj & Co addressed to the defendant dated 20 September 2005 as seen at p. 90 of the appeal record at Jilid 2(1), the solicitors wrote, "Further, our client shall be at B liberty to conduct the repairs on the aircraft and the hangar doors, etc and all expenses arising therefrom shall be claimed by our client from you".

[46] Azizulhisham bin Che Hasihim affirmed an affidavit in reply C for the defendant dated 19 July 2011 and at para. 9(iv) at p. 30 of the appeal record at Jilid 2(1), he denied receiving the documents mentioned as exh. "JJ2" as reflected at pp. 91 to 99 of the appeal record at Jilid 2(1). Exhibit "JJ2" was an e-mail to the defendant and it showed that:

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(a) at p. 91 of the appeal record at Jilid 2(1), the e-mail to the defendant did not mention about Sprint Air Inc;

(b) at pp. 92 to 96 of the appeal record at Jilid 2(1) were letters unconnected with the defendant and the facsimile numbers E contained therein did not belong to the defendant and there was no evidence that those documents were delivered to the defendant at all; and

(c) at pp. 97 to 99 of the appeal record at Jilid 2(1), no evidence F were shown that Sprint Air Inc is the insured or the owner of the Cessna aircraft.

[47] In regard to exh. "JJ3" as seen at pp. 101 to 107 of the appeal record at Jilid 2(1), the slip cover was issued by the defendant on 27 July 2004 as per p. 98 of the appeal record at G Jilid 2(1), to the insured Serac Asia Sdn Bhd - the plaintiff herein, and not to Sprint Air Inc.

[48] The sum total of it all would be this. That at all material times, the defendant was acting as an insurance broker and not H the insurer. The duty falls on the insurer to verify the claim and the defendant here merely acted as a postman.

[49] The plaintiff submitted and produced the search result that was done on 22 February 2012 which stated that the Cessna I aircraft was still registered in the name of Sprint Air Inc. With respect, the plaintiff had never produced this search result in their affidavit in reply to the defendant's application in encl. 29.

Misrepresentation of a Material Fact

[50] The material fact would be the actual legal ownership of the Cessna aircraft. At all material times, the plaintiff had not disclosed to the defendant the fact that the plaintiff was not the actual legal owner of the Cessna aircraft.

[51] The insurance policy and the cover note were under the plaintiff's name. The plaintiff concealed the material fact that the actual registered legal owner of the Cessna aircraft is in fact Sprint Air Inc.

[52] If it was true as alleged that the plaintiff had disclosed to the defendant the actual legal owner of the Cessna aircraft, the defendant as a prudent and experienced underwriter or broker would not have issued the cover note in the plaintiff's name.

[53] It is trite law that an insurance contract is a contract *uberrima fides*. And that such contract can be avoided not only for misrepresentation but also for non-disclosure of material facts. See *Asia Insurance Co Ltd v. Tat Hong Plant Leasing Pte Ltd* [1992] 1 CLJ 330; [1992] 4 CLJ (Rep) 324, HC.

[54] It is a correct statement of the law to say that an insurer can avoid the insurance policy if he can prove that there has been misrepresentation of a material fact by the assured.

The Associated and Subsidiary Companies

[55] It was submitted by the plaintiff that the re-insurance cover note from Messrs Bertil Grimme (Asia) Limited dated 20 January 2005 as per p. 242 of the appeal record at Jilid 2(2) named the assured as "Serac Asia Sdn Bhd and/or their respective Associated and Subsidiary Companies for their rights and interests and/or as original". But in the affidavit of Andre Jean Jacques Graffin, a French citizen and a director of the plaintiff that was affirmed on 6 July 2011 as seen at p. 21 of the appeal record at Jilid 2(1), the deponent admitted that the registration of the Cessna aircraft was under a company named Sprint Air Inc. This averment by the deponent was the true material fact which was not disclosed by the plaintiff when the appeal was heard regarding the setting aside of the default judgment. That being the case, the plaintiff must now be estopped from claiming that the material fact was used by the defendant as an afterthought.

[56] Evidence wise, the plaintiff had filled up the proposal form which formed the basis of the insurance policy and since the plaintiff had failed to make a frank and full disclosure, it must, consequently, be guilty of non-disclosure of the material fact. The defendant must not be held liable under the insurance policy. See *Chung Kuo Ping v. Malaysian Assurance Alliance Bhd* [2008] 3 CLJ 752, CA.

Insurable Interest

[57] To succeed in its claim for damages as per paras. 17, 18, 22 and 23 of its statement of claim, the plaintiff must have "insurable interest". Here, the plaintiff has no insurable interest in the Cessna aircraft at the very inception of the insurance policy because the plaintiff was not the registered legal owner of the said aircraft. On the balance of probabilities, the plaintiff failed to prove that it has an insurable interest. Neither has the plaintiff established on the balance of probabilities that it is the legal owner of the Cessna aircraft. And the plaintiff too has no *locus standi* or standing to commence the proceedings against the defendant.

Conclusion

[58] Having heard the arguments of learned counsel on both sides, we unanimously dismissed the appeal by the plaintiff with costs of RM20,000 here and below. We affirmed the decision of the High Court. Deposit should rightly go to the defendant.

[59] We have mulled through the evidence at great length and we have perused through the evidence with a fine toothcomb.

[60] The fresh evidence questioned the *locus standi* of the plaintiff to institute this action and it centred on the legal ownership of the Cessna aircraft which is the subject matter of this suit. It showed that the Cessna aircraft is registered under the name of Sprint Air Inc and the defendant only came to know of this fact after the bundle of documents for the assessment of damages was forwarded to the defendant on 20 May 2011. In our judgment, the plaintiff has no insurable interest and that interest is vested in Sprint Air Inc. And the damages were also suffered by Sprint Air Inc and not the plaintiff. The defendant is also not the tort feasor to Sprint Air Inc. In our judgment, the defect to the plaintiff's writ of summons and the statement of claim was so fundamental that it ought to be struck out forthwith.